

**Suburban Ambulance Service, Inc. and Deborah  
Freiberg. Case 9-CA-19207**

31 July 1984

**DECISION AND ORDER**

**BY CHAIRMAN DOTSON AND MEMBERS  
ZIMMERMAN AND DENNIS**

Upon a charge filed 18 January 1983 by Deborah Freiberg, herein called Freiberg, and duly served on Suburban Ambulance Service, Inc., herein called the Respondent, the General Counsel of the National Labor Relations Board issued a complaint 8 March 1983 against the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the National Labor Relations Act. Copies of the charge and complaint and notice of hearing before an administrative law judge were served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that about 23 November 1982 the Respondent's employee Freiberg concertedly complained to the Respondent regarding the working conditions of the Respondent's employees; that about the same day the Respondent discharged Freiberg; and that the Respondent did so because Freiberg engaged in conduct described above, and in order to discourage employees from engaging in such activities for the purpose of collective bargaining or other mutual aid or protection. The Respondent failed to file an answer to this complaint.

On 13 April 1983 the General Counsel filed a Motion for Summary Judgment. On 18 April 1983 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent failed to respond to the Notice to Show Cause.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

**Ruling on Motion for Summary Judgment**

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 10 days from service of the complaint, unless good cause is shown. The complaint states that unless an answer is filed within 10 days of service, "all the allegations in the complaint shall be deemed to be admitted to be true and shall be so found by the Board." The Respondent did not file an answer to the complaint. Counsel for the General Counsel advised the Respondent by certified

letter dated 28 March 1983 that it had failed to file an answer to the complaint issued in this case, that an extension of time to file an answer could be obtained, and that unless an answer were filed by 4 April 1983, a motion would be made before the Board for the entry of an order based on the uncontroverted allegations of the complaint. The Respondent failed to file an answer within the extended time. On 11 April 1983, no answer having been filed, counsel for the General Counsel filed the instant Motion for Summary Judgment.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

**FINDINGS OF FACT**

**I. JURISDICTION**

The Respondent, an Indiana corporation, with an office and place of business in Jeffersonville, Indiana, is engaged in providing ambulance service to various hospitals in the Louisville, Kentucky area. In the 12 months prior to the filing of the complaint, the Respondent performed services valued in excess of \$50,000 for various hospitals located in States other than the State of Indiana.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

**II. THE UNFAIR LABOR PRACTICES**

About 23 November 1982 the Respondent's employee Freiberg concertedly complained to the Respondent regarding the working conditions of the Respondent's employees. About the same day, 23 November 1982, the Respondent discharged Freiberg. The Respondent took the above action in response to Freiberg's concerted complaint and in order to discourage employees from engaging in such activities for the purpose of collective bargaining or other mutual aid or protection.

On the basis of this conduct, we find that the Respondent is and has been engaging in unfair labor practices affecting commerce within the meaning of Section 8(a) and (7) of the Act.

**THE REMEDY**

Having found that the Respondent has discharged employee Deborah Freiberg in violation of Section 8(a)(1) of the Act, we shall order the Respondent to cease and desist from such conduct and to offer immediate and full reinstatement to her former job or, if such job no longer exists, to a sub-

stantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed, and make her whole for any loss of earnings suffered by her because of her unlawful discharge. The backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).<sup>1</sup> Moreover, consistent with the Board's decision in *Sterling Sugars*, 261 NLRB 472 (1982), we shall also require the Respondent to expunge from its records any reference to the unlawful discharge of Freiberg and to provide written notice of such expunction to Freiberg and inform her that the Respondent's unlawful conduct will not be used as a basis for future personnel actions concerning her.

The Board, on the basis of the foregoing facts and the entire record, makes the following

#### CONCLUSIONS OF LAW

1. Suburban Ambulance Service, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Suburban Ambulance Service, Inc., by discharging its employee Freiberg for her concerted complaint regarding working conditions, and in order to discourage employees from engaging in such activities for the purpose of collective bargaining or other mutual aid or protection, has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### ORDER

The National Labor Relations Board orders that the Respondent, Suburban Ambulance Service, Inc., Jeffersonville, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise retaliating against employees because of their protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action.

(a) Offer Deborah Freiberg immediate and full reinstatement to her former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Deborah Freiberg whole for any loss of earnings she may have suffered due to the discrimination practiced against her as provided in the section of this Decision entitled "The Remedy."

(c) Expunge from its files any reference to the discharge of Deborah Freiberg about 23 November 1982, and notify her in writing that this has been done and that the evidence of this unlawful discharge will not be used as a basis for future personnel actions against her.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its business office copies of the attached notice marked "Appendix."<sup>2</sup> Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

CHAIRMAN DOTSON, dissenting.

It is clear to me in this case that the General Counsel, by means of an insufficient, poorly drafted complaint based on unsupported inferences, has failed to establish a violation of the Act. For this reason, I respectfully dissent.

The Board's Rules and Regulations require that a complaint contain "(1) a clear and concise statement of the facts upon which assertion of jurisdiction by the Board is predicated, and (2) a clear and concise description of the acts which are claimed to constitute unfair labor practices . . ."<sup>1</sup> Furthermore, Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be rendered only when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there

<sup>2</sup> If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>1</sup> NLRB Rules and Regulations, § 102.15.

<sup>1</sup> See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."<sup>2</sup>

The allegations of the complaint<sup>3</sup> are deficient in respect to these standards. By asserting in general terms that the Charging Party "concertedly complained" to the Respondent regarding working conditions of the Respondent's employees, the General Counsel asks us to affirm a legal conclusion which has no foundation. Nowhere in the complaint is there evidence indicating that the employee's action intended or contemplated any group activity, that she was acting on behalf of or as a representative of other employees. In a theoretical sense, the employee, by complaining of working conditions, *might* have been engaged in concerted action, but there simply is no supporting evidence of that conclusion in the complaint before us.

Establishing that the activity in question is "concerted" is an essential predicate (and, in effect, a jurisdictional requirement) which the General Counsel has failed to meet in this case. Rather than offering us a factual basis, the General Counsel has asserted a legal presumption and is, in effect, asking us to blindly accept his denotation in the complete absence of any corroboration. In these circumstances I find substantial and material issues of fact and law are raised by the complaint despite the fact that the Respondent failed to file an answer. Unless and until the allegations establish a *prima facie* violation of the Act, granting a Motion for Summary Judgment represents a blatant disregard of estab-

lished standards of law. I would therefore deny the General Counsel's Motion for Summary Judgment.

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise retaliate against employees because of their protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Deborah Freiberg immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed and WE WILL make her whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL expunge from our files any reference to the discharge of Deborah Freiberg about 23 November 1982, and WE WILL notify her that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against her.

SUBURBAN AMBULANCE SERVICE, INC.

<sup>2</sup> Fed.R.Civ.P.56(c).

<sup>3</sup> The relevant allegations of the complaint are as follows.

4. On or about 23 November 1982, Respondent's employee Freiberg, the Charging Party herein, concertedly complained to Respondent regarding the working conditions of Respondent's employees.

5. (a) On or about 23 November 1982, Respondent discharged Freiberg.

(b) Respondent engaged in the conduct described above in paragraph 5(a), because Freiberg engaged in the conduct described above in paragraph 4, and in order to discourage employees from engaging in such activities for the purpose of collective bargaining or other mutual aid or protection.